

# Exhibit E

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SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: CIVIL PART  
BERGEN COUNTY  
(HEARD VIA ZOOM)  
DOCKET NO: BER-L-3681-20  
A.D. # \_\_\_\_\_

OPTICAL SERVICES USA/	)	
JC1, OPTICAL SERVICES	)	
USA, LLC, OPTICAL	)	TRANSCRIPT
SERVICES USA-WO, RE & LE	)	
HOLDINGS, LLC, STONG OD	)	OF
EWING NJ, LLC,	)	
	)	MOTION
Plaintiffs,	)	
	)	
vs.	)	
	)	
FRANKLIN MUTUAL	)	
INSURANCE COMPANY,	)	
	)	
Defendant.	)	

Place: Bergen County Justice Center  
10 Main Street  
Hackensack, New Jersey 07601

Date: August 13, 2020

BEFORE:

HONORABLE MICHAEL N. BEUKAS, J.S.C.

TRANSCRIPT ORDERED BY:

ERIC L. HARRISON, ESQ. (Methfessel & Werbel)

APPEARANCES:

SEAN E. ROSE, ESQ. (Olender Feldman, LLP)  
Attorney for Plaintiffs

ERIC L. HARRISON, ESQ. (Methfessel & Werbel)  
Attorney for Defendant

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I N D E X

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(Proceeding commenced at 9:30:49 a.m.)

THE COURT: Superior Court of the State of New Jersey, Bergen County Vicinage, clerk recording, Alexa D'Angelo law clerk, docket number BER-L-3681-20, caption is Optical Services USA/JCI (sic), Optical Services USA, LLC, Optical Services USA-WO, and Re and Le Holdings, LLC, Stong OD Ewing NJ, LLC versus Franklin Mutual Insurance Company. Judge Michael N. Beukas, chambers 453. The time is approximately 9:32 a.m. May I have the appearances of counsel for the record, please, starting with the plaintiff?

MR. ROSE: Good morning, Your Honor. Sean Rose from the law firm of Olender Feldman on behalf of plaintiff, Optical Services USA/JC1, Optical Services USA, LLC, Optical Services USA-WO, Re and Le Holdings, LLC, and Stong OD Ewing NJ, LLC, collectively plaintiffs, Your Honor.

THE COURT: Good morning, Counsel.

MR. ROSE: Good morning.

MR. HARRISON: Good morning, Judge. Eric Harrison, Methfessel and Werbel, on behalf of Franklin Mutual Insurance Company.

THE COURT: Good morning, Counsel. Okay, gentlemen, just a -- a couple of --

RECORDING: (Indiscernible) --

1 THE COURT: -- reminders before we --

2 RECORDING: -- is now in the conference.

3 MR. HARRISON: Your Honor, this is Eric  
4 Harrison speaking. As a courtesy, I should let the  
5 Court know I do have a few folks dialing in. They've  
6 all been instructed to keep their phones on mute.  
7 Various FMI representatives and a colleague of mine  
8 will be listening in but will not be participating.

9 THE COURT: Okay, very good.

10 For purposes of our established record here  
11 today, gentlemen, when you do speak at oral argument, I  
12 do need you to identify yourself in between oral  
13 arguments so that the transcription service can clearly  
14 identify which attorney is speaking.

15 When you are referencing an oral argument to  
16 any specific controlling case, I need you to identify  
17 that case for the record and pursuant to Rule 1:36-3, I  
18 need you to identify for the record whether that is a  
19 published opinion in the State of New Jersey versus an  
20 unpublished opinion and whether or not you are citing  
21 to any law of any other jurisdiction including the US  
22 Supreme Court so that I can identify for the record as  
23 to whether or not any of the law is controlling in this  
24 case for purposes of oral argument.

25 In addition, we are on a Polycom speaker

1 today and at times it may be difficult for you to hear  
2 me and I may need to interject to pose a question to  
3 either attorney so I may have to elevate my voice so  
4 that you can hear me clearly. So please don't  
5 misconstrue me elevating my --

6 RECORDING: (Indiscernible) --

7 THE COURT: -- voice --

8 RECORDING: -- is now in the conference.

9 THE COURT: Okay, gentlemen, I -- if I need  
10 to elevate my voice, it's for purposes of the Polycom  
11 picking up my voice so that you can hear it, okay.

12 So I have before me a Motion to Dismiss the  
13 Complaint for failure to state a claim upon which  
14 relief can be granted pursuant to Rule 4:6-2(e) filed  
15 by the defendant, Franklin Mutual Insurance Company.  
16 So, Mr. Harrison, this is your Motion. You may  
17 proceed.

18 MR. HARRISON: Yes, sir. Thank you, Your  
19 Honor. We are all aware, I know plaintiffs' counsel is  
20 aware, certainly my firm as an insurance defense firm  
21 is well aware of the fast-moving nature of developments  
22 in insurance litigation and other litigation over  
23 Covid-19. Two significant events happened yesterday  
24 and they're both worthy of mention. The first is, and  
25 this is not within the record, but the Court -- it's

1 not important to the Court's decision on the policy  
2 language, but it's -- it's significant background. The  
3 multi-district litigation panel of the United States  
4 District Court denied a nation-wide Motion to  
5 Consolidate these business interruption litigations  
6 that are venued in various Federal Courts around the  
7 country essentially on the basis that the policy  
8 language differs from policy to policy. Even though a  
9 lot of insurers use (indiscernible) income and would  
10 other insurers, there is still significant differences  
11 between those forms and the facts of particular cases  
12 also can determine whether there would be coverage and  
13 to what extent.

14 The second significant thing to happen  
15 yesterday was the issuance of the decision that Mr.  
16 Rose brought to the Court's attention, and I don't have  
17 any objection to his filing it yesterday because it  
18 didn't come out until yesterday and I have had ample  
19 time to review it. It's the Studio 417 case from U.S.  
20 District Court, Western District of Missouri, Southern  
21 Division. This opinion, which I'm not going to  
22 significantly disagree with, demonstrates the wisdom of  
23 the MDO panel in refusing to consolidate because the  
24 denial of the Motion to Dismiss based on the  
25 allegations in that complaint bespeaks the importance



1 of policy language differing from policy to policy and  
2 alleged facts differing from complaint to complaint.

3 I should ask as a courtesy whether the Court  
4 has any objection to me talking about this case that  
5 Mr. Rose sent yesterday.

6 THE COURT: What I would like you to do,  
7 Counsel, is argue your Motion to Dismiss. This Court  
8 is bound by the implications of Rule 1:36-3. While the  
9 parties felt compelled to cite to numerous other  
10 jurisdictions with respect to their arguments, their  
11 respective arguments both on the Motion and in the  
12 Opposition, this Court is bound by legal precedent  
13 within the State of New Jersey, namely the Appellate  
14 Division, and the New Jersey Supreme Court. With  
15 respect to the US Supreme Court, this -- this Court  
16 also takes precedent from the US Supreme Court for  
17 controlling decisions. So this Court will give  
18 whatever weight is necessary to whatever arguments  
19 reflect in the controlling legal precedent set forth in  
20 this state as opposed to other states. So you may  
21 proceed with the argument.

22 MR. HARRISON: Okay, thank you, Your Honor.  
23 I just -- I just wanted to make sure that the Court  
24 didn't want me to completely disregard this decision.  
25 But I'm going to highlight it simply to contrast it

1 with a case we're looking at in order to argue my  
2 position under New Jersey law.

3 The Studio 417 decision describes a policy  
4 which defines a covered cause of loss, and that's at  
5 page 2 of the opinion, as follows, "Accidental direct  
6 physical loss or accidental direct physical damage."  
7 It goes on to say on the same page, "The policies do  
8 not include and are not subject to any exclusion for  
9 losses caused by viruses or communicable diseases."

10 Now, I want to be clear about something. I  
11 want to be clear about a point of agreement that  
12 Franklin Mutual has with the plaintiffs in this case.  
13 At paragraph 36 of the Complaint filed in this case,  
14 plaintiffs recite as follows, "There is no known  
15 instance of Covid-19 transmission or contamination  
16 within the premises of plaintiffs' businesses." Now,  
17 the declamation of coverage letter that FMI issued  
18 prior to the Complaint being filed in this case because  
19 the Complaint challenges that declamation of coverage  
20 find it among relevant policy provisions the exclusion  
21 of 12(c) for contamination by any virus, et cetera.  
22 Because the complaint expressly asserts that there was  
23 no contamination and because it is our universal duty  
24 to read as accurate all facts alleged in the complaint  
25 and I agree that the contamination exclusion would not

1       apply to this case. If the complaint had alleged that  
2       there was contamination on the premises, then there  
3       probably would be direct physical loss, but there would  
4       also be exclusion of coverage under that virus  
5       exclusion. So what we're really focused on is the  
6       policy language. In Studio 417, the definition of loss  
7       there was physical loss or physical damage.

8               THE COURT: Okay, but we're concerned about  
9       New Jersey. We're not concerned about the Western  
10      District of Missouri; correct?

11             MR. HARRISON: That is true, Your Honor, but  
12      we are concerned about policy language defining direct  
13      physical loss, --

14             THE COURT: Okay, but the --

15             MR. HARRISON: -- but I'm -- I'm happy to  
16      take it --

17             THE COURT: -- definition (indiscernible) --

18             MR. HARRISON: -- to our policy language.

19             THE COURT: -- definition has not been  
20      established by any court in this state with the  
21      exception of the Wakefern case; correct?

22             MR. HARRISON: I think that is absolutely  
23      correct.

24             THE COURT: Okay, I just want to establish  
25      that for purposes of the record.

1 MR. HARRISON: Okay, so back to our policy.  
2 The business interruption loss that -- of which  
3 plaintiffs seek to avail themselves governs loss of  
4 income resulting from direct covered loss. We go to  
5 page 9 of the policy form which expressly defines  
6 direct covered loss as follows, "The fortuitous direct  
7 physical loss as described in Part 1(c), General Cause  
8 of Lost Conditions, Coverages A, B, C, which occurs at  
9 described premises occupied by you." Now, the  
10 definition is (indiscernible) if it didn't refer -- if  
11 it didn't cross-reference another definition, then we'd  
12 be fighting over whether the closure of a business  
13 because of a risk of virus spread would constitute a  
14 fortuitous direct physical loss.

15 However, because it cross-references the  
16 description of direct covered loss that's also in the  
17 policy at page 8. We go to the more detailed  
18 definition. Covered loss, "Means fortuitous direct  
19 physical damage to or destruction of covered property  
20 by a covered cause of loss." The requirement of direct  
21 physical damage to or destruction of (indiscernible) --

22 RECORDING: (Indiscernible).

23 MR. HARRISON: -- requirement of direct  
24 physical damage to or destruction of covered property  
25 distinguishes this case from the Studio 417 case in

1 that there is the physical damage or destruction  
2 requirement that was absent in that case which also had  
3 --

4 RECORDING: (Indiscernible) is now in the  
5 conference.

6 MR. HARRISON: -- I apologize -- which also  
7 had the open-ended concept of loss which was not  
8 defined. Our policy defines loss as requiring that  
9 physical impact.

10 The Court has reviewed Wakefern I know and  
11 the -- the cases -- the New Jersey cases discussed in  
12 our brief I agree that there is no case directly on  
13 point construing the -- this precise policy language in  
14 the context a claim where there was a closure of a  
15 business because of the risk of contamination by a  
16 virus. But I think that the application of loss that's  
17 set forth in New Jersey and in the other jurisdictions  
18 we've cited as persuasive, although not binding,  
19 compels the conclusion that this did not meet the  
20 policy definition of direct covered loss to satisfy  
21 coverage.

22 THE COURT: Counsel, let me pose -- let me  
23 pose one question to you. Why didn't the policy then  
24 have specific exclusions for an event such as this?  
25 Meaning for virus proliferation.

1 MR. HARRISON: Well, it -- it precisely has  
2 an exclusion for virus proliferation. It does not have  
3 an exclusion for a closure of business based on the  
4 risk of virus proliferation. I can't speak to the  
5 drafters of the policy other than to say this is an  
6 unprecedented event. First in my lifetime. First in  
7 my parents and our parents. So, yeah, in -- in an  
8 ideal world all potential cataclysmic risks could be  
9 underwritten and determined in advance as to what we're  
10 going to cover and to what extent or whether there  
11 should be any coverage at all, but before we get to the  
12 absence of an exclusion, and I agree there is no  
13 exclusion that would apply on the facts as alleged in  
14 this Complaint, we have to satisfy the coverage  
15 definition first.

16 THE COURT: You can proceed, Counsel. Thank  
17 you.

18 MR. HARRISON: I -- Your Honor, to -- to be  
19 candid, I know you've reviewed the papers. I'm happy  
20 to address any further questions the Court may have or  
21 simply reserve an opportunity to respond to my  
22 colleague. I -- I think between our papers and what  
23 I've had to say this morning that I've stated our case.

24 THE COURT: Thank you, Counsel. Okay, Mr.  
25 Rose, your response?

1 MR. ROSE: Thank you, Your Honor. And just  
2 to try to make sure that there's a clean record  
3 virtually, this is again Sean Rose, Olender Feldman, on  
4 behalf of plaintiff.

5 So contrary to the insurance industry's well  
6 rehearsed talking points and -- and Mr. Harrison has a  
7 very good brief and very good argument, the simple fact  
8 is that plaintiff and the many other in the -- and  
9 (indiscernible) plaintiffs purchased business owners  
10 policies to insure against, among other things,  
11 unexpected business interruptions. And what happened  
12 back in March, as we all know because we all lived  
13 through it, that's about as unexpected as you get.  
14 Plaintiffs were forced to close their businesses  
15 because the executive order issued by the State --  
16 well, the State pertinent to here, but issued across  
17 the country in emergency response to the pandemic found  
18 that there is a dangerous condition on plaintiffs'  
19 property. As a result of those orders, the plaintiffs  
20 closed. All residents were told to stay at home and  
21 (indiscernible) claims (indiscernible).

22 Now, as Mr. Harrison pointed out, the  
23 briefing reflects that there are really two main points  
24 of argument that -- that I'll hit quickly because they  
25 are recited at length in the brief is the first

1 (indiscernible) on the direct physical loss issue. We  
2 know from, and just to again bide by Your Honor's  
3 directive, we know that under the Gregory Packaging,  
4 Inc. versus Travelers Property Casualty Company of  
5 America case, which is an unpublished case, but from  
6 the District of New Jersey and cited in both Mr.  
7 Harrison's and our brief, we know that a dangerous  
8 condition on the property can constitute a physical  
9 loss. Now, here, we have an executive order that found  
10 that plaintiffs' businesses were deemed unfit and  
11 unsafe because of a dangerous condition. Plaintiffs'  
12 loss of income caused by the closure orders concluding  
13 that there was a dangerous condition on the property is  
14 a direct physical loss. Alternatively, if we wanted to  
15 get into the legal standard, at a minimum, it is  
16 plausible the plaintiffs have alleged a direct physical  
17 loss here which should defeat a (indiscernible) Motion  
18 and allow plaintiffs to pursue discovery, among other  
19 things, to discern the true intent behind policy terms  
20 which, in some cases, points to coverage but in other  
21 cases it may be ambiguous.

22 The second point would be the civil authority  
23 coverage and I -- I think here, the Western District of  
24 Missouri case has instructed, and I'll get to that in a  
25 second, here we -- we, again, we know what happened.



1 We all lived through it. The closure orders forced  
2 plaintiffs to close and banned occupancy of all non-  
3 essential businesses. In doing so, the closure orders  
4 necessarily not only affected plaintiffs' businesses,  
5 but they affected all -- all properties around  
6 plaintiffs. It was a stay-at-home order. Unless it  
7 was an essential business, everything was closed. It's  
8 alleged -- it -- it's in the Motion and, you know,  
9 beyond that, Your Honor, we all lived through it. We  
10 were all there. So, again, at a minimum, it is  
11 plausible that plaintiffs are entitled to  
12 (indiscernible) coverage here. And unless Your Honor  
13 has any questions, I know the briefing was fairly  
14 detailed.

15 THE COURT: Thank you, Mr. Rose. You know,  
16 at the outset, gentlemen, I do commend the both of you  
17 with respect to a very, very difficult topic and  
18 concept in the State of New Jersey with regard to the  
19 interpretation of insurance law. I did find that the  
20 respective briefs were very well drafted.

21 Mr. Harrison, do you have a reply at this  
22 point?

23 MR. HARRISON: Briefly, Your Honor, yes. Mr.  
24 Rose says the executive order for -- forced closure  
25 based on a finding that there was a dangerous condition

1 on plaintiffs' property. That's -- that's simply not  
2 the case. The -- the Complaint does not allege that.  
3 I understand what he's saying. It -- it's a -- it's a  
4 directive closing down non-essential businesses based  
5 on the risk that putting people in proximity to each  
6 other indoors could result in transmission of the  
7 virus, could -- it could result in the virus sitting on  
8 a piece of equipment in one of the plaintiffs'  
9 examining rooms, but the Complaint in this case  
10 expressly alleges that there has been no known instance  
11 of Covid-19 transmission or contamination.

12 I -- I get it that this is business  
13 interruption insurance and to quote one of the judges I  
14 appeared before in my first year arguing coverage  
15 motion, he said, Mr. Harrison, before we turn to the  
16 policy terms, everybody knows that when an insured buys  
17 insurance for something, their reasonable expectation  
18 is that they're going to be covered for whatever might  
19 befall them, but then we got to go to the policy  
20 language and if indeed coverage was determined by the  
21 name of the coverage, business interruption, well, then  
22 the insurance industry loses and FMI loses this case  
23 because we're not disputing that there was business  
24 interruption. Although if we were to have to dig  
25 deeper, we would probably have a dispute over whether

1 plaintiffs were non-essential businesses, but that's  
2 not what this Motion is about. The law requires that  
3 we look carefully at the policy language. And with  
4 reference to Gregory Packaging, we're talking about the  
5 release of ammonia into the air, talking about  
6 something physically occurring and I think it's -- it's  
7 clear from the plain policy language and the meaning of  
8 the terms, which are precisely defined in the policy,  
9 that in this instance under this policy based on these  
10 allegations there is no direct covered loss.

11 In -- in asking for discovery to determine  
12 the true intent behind policy terms, right, that's  
13 something you need to speak about briefly. When policy  
14 language is clear, I am not aware of any precedent  
15 which would support denial of a Motion to Dismiss on  
16 the basis that the plaintiff is entitled to conduct  
17 discovery to see what the drafter of the document, who  
18 I can tell the Court was not -- is not an employee of  
19 FMI, had in mind when defining direct covered loss or  
20 covered loss.

21 There -- there is -- in New Jersey we do have  
22 a -- a big case called Morton International which has  
23 to do with pollution exclusions and that's where our  
24 courts created this -- the concept of regulatory  
25 estoppel where essentially the insurance industry

1       lobbied to insert a particular form of coverage within  
2       a policy with an exclusion for -- that applied to  
3       environmental losses and essentially the courts found,  
4       hey, you came to the Department of Banking and  
5       Insurance putting forth this policy language suggesting  
6       it would do something and then you went to court and  
7       suggested otherwise. There is no such allegation in  
8       this case. I haven't seen any such allegation even  
9       made in the press or -- or by the various  
10      (indiscernible) or -- or in any case that's being  
11      litigated that I'm aware of. When the plain policy  
12      terms apply plainly and directly to the facts asserted,  
13      I'm not aware of any legitimate basis for denying a  
14      Motion based on the facts accepted as true in the  
15      pleading on the basis that plaintiff wishes to take  
16      discovery to see what the defendant meant by policy  
17      language that somebody else wrote which the defendant  
18      adopted if the plain language controls and is  
19      unambiguous and I submit that it does control and it is  
20      unambiguous here.

21               THE COURT: Thank you. Gentlemen, thank you,  
22      very much. I'm prepared to rule on this Motion.

23               This matter comes before the Court on a  
24      Motion Seeking Dismissal of the plaintiffs' Complaint  
25      with prejudice pursuant to Rule 4:6-2(e). The Court

1 begins with a few general observations concerning the  
2 standards governing dismissal motions under Rule 4:6-  
3 2(e) by citing Flinn v. -- Flinn v. Amboy National  
4 Bank, 40 -- 436 N.J.Super. 274, (App. Div. 2014), "In  
5 reviewing a complaint dismissed under Rule 4:6-2(e),  
6 the inquiry is limited to examining the legal  
7 sufficiency of the facts alleged on the face of the  
8 complaint," citing Printing Mart-Morristown versus  
9 Sharp Electronics Corp., 116 N.J. 739 at page 746  
10 (1989) and Rieder versus Department of Transportation,  
11 221 N.J.Super. 547 at page 552 (App. Div. 1987).

12 The essential test as set forth in Green  
13 versus Morgan Properties, 215 N.J. 431 at page 451  
14 (Sup. Ct. 2013) is, "Whether a cause of action is  
15 'suggested' by the facts," citing Printing Mart-  
16 Morristown versus Sharp Electronics Corp., 116 N.J. at  
17 746 quoting Velantzas versus Colgate-Palmolive Co., 109  
18 N.J. 189 at page 192 (1988).

19 "A reviewing court searches the complaint in  
20 depth and with liberality to ascertain whether the  
21 fundamental of a cause of action may be gleaned, even  
22 from an obscure statement of claim, opportunity being  
23 given to amend if necessary," citing Di Cristofaro  
24 versus Laurel Grove Memorial Park, 43 N.J.Super. 244 at  
25 page 252 (App. Div. 1957).

1           In the case of Rule 4:6-2(e), Dismissals,  
2       "The Court is not concerned with the ability of the  
3       plaintiffs to prove the allegation contained in the  
4       complaint," citing Somers Construction Co. versus Board  
5       of Education, 198 F.Supp. 732, 734 (Dis. NJ. 1961).

6       Instead,

7           "The plaintiffs are entitled to every  
8       reasonable inference of fact and the examination of a  
9       complaint's allegations of fact required by the  
10      aforestated principle should be one that is at once  
11      painstaking and undertaken with a generous and  
12      hospitable approach,"

13           citing Green versus Morgan Properties, 215  
14      N.J. 431 at page 452 quoting Printing Mart-Morristown  
15      versus Sharp Electronics Corp., 116 N.J. at 746.

16           Notwithstanding this indulgent standard, "A  
17      pleading should be dismissed if it states no basis for  
18      relief and discovery would not provide one," citing  
19      Rezem Family Associates, LP versus Borough of  
20      Millstone, 423 N.J.Super. 103 at page 113 (App. Div.  
21      2011), cert. denied and the appeal was dismissed at 208  
22      N.J. 366 (2011). See also Sickles versus Cabot Corp.  
23      379 N.J.Super. 100 at page 106 (App. Div. 2005) cert.  
24      denied at 185 N.J. 297 (2005).

25           In those rare instances, as cited in Smith

1 versus SBC Communications, Inc., 178 N.J. 265 at page  
2 282 (2004), a motion to dismiss pursuant to Rule 4:6-  
3 2(e) ordinarily is granted without prejudice. See  
4 Hoffman versus Hampshire Labs Incorporated, 405  
5 N.J.Super. 105, 116 (App. Div. 2009).

6           The defendant, Franklin Mutual Insurance  
7 Company, hereinafter FMI, issued a business owners  
8 policy to plaintiff, Optical Services USA/JC1 under  
9 policy number SBP2598006 with effective dates of  
10 October 5, 2019 to October 5, 2020. FMI issued the  
11 business owners policy to the plaintiff, Stong OD Ewing  
12 NJ, LLC, hereinafter Stong OD, bearing policy number  
13 SBP2613680 with effective dates of April 1, 2020 to  
14 April 1, 2021. Optical Services USA/JC1 and Stong OD  
15 filed separate claims seeking loss of business income  
16 caused by the closure mandated by Governor Murphy's  
17 March 21, 2020 Executive Order Number 107 suspending  
18 the operation of non-essential retail businesses on the  
19 account of the Covid-19 pandemic. Plaintiffs closed  
20 their businesses on March 20, 2020 and have not  
21 reopened to date. Plaintiffs allege that Executive  
22 Order Number 107 mandated the closure of their  
23 businesses. FMI issued letters dated April 6, 2020 and  
24 April 14, 2020 to Optical Services USA/JC1 and Stong OD  
25 denying their claims for business income and related

1 expenses. Plaintiffs, Optical Services USA, LLC,  
2 Optical Services USA-WO, Re and Le Holdings, LLC were  
3 not named insureds on either policy.

4 Both policies contained the BU04010110  
5 Business Owners Policy Form. The plaintiffs allege  
6 that the -- the plaintiffs allege that Optical Services  
7 USA/JC1, Optical Services USA, LLC, Optical Services  
8 USA-WO, Re and La -- and Le Holding, LLC and Stong OD  
9 Ewing NJ, LLC purchased business interruption insurance  
10 from insurers to protect their business from an -- an  
11 unanticipated crisis. The plaintiffs further allege  
12 that the policies issued by FMI provide coverage for  
13 loss of income resulting from a necessary interruption  
14 of plaintiffs' businesses caused by direct covered  
15 losses and temporary closures required by orders of a  
16 civil authority.

17 A Complaint for a Declaratory Judgment in  
18 this action was filed on June 25, 2020. The Complaint  
19 also included a Demand for Trial by Jury. No answer  
20 has been filed by the defendant, FMI. Therefore, the  
21 discovery end date has not been established in this  
22 case.

23 On July 15, 2020, the defendant, FMI, filed a  
24 Motion Seeking Dismissal of the Complaint pursuant to  
25 Rule 4:6-2(e). Within days of filing the Complaint,



1 the defendant, FMI, filed the within Motion to Dismiss.  
2 It is clear that there is no established record in this  
3 case and there has been no discovery presented to the  
4 Court for consideration with respect to the arguments  
5 and events by respective legal counsel.

6 Notwithstanding same, the defendants argued three  
7 points before this Court. The first legal argument is  
8 that the Court should dismiss the complaint for failure  
9 to state a legally cognizable claim. The second legal  
10 argument is that the plaintiffs did not sustain direct  
11 physical loss or direct physical damage to or  
12 destruction of covered property precluding coverage for  
13 business income or extra expenses under the FMI policy.  
14 Lastly, the defendants argue that the plaintiffs  
15 occupancy of their respective properties was not  
16 prohibited by civil authorities because of a loss at a  
17 local premises not owned or occupied by the plaintiffs  
18 precluding civil authority coverage under the FMI  
19 policies.

20 The plaintiffs argue before this Court that  
21 they state claims for coverage under the policies  
22 because they suffered a direct covered loss and were  
23 forced to close their business by order of a civil  
24 authority. Plaintiffs further allege that they state  
25 claims for loss of income coverage because they

1 suffered a direct covered loss under the policy and  
2 they state claims for civil coverage because the  
3 closure order prohibited the plaintiffs from accessing  
4 their business.

5 Naturally, each of the respective arguments  
6 advanced by the parties requires a fact-sensitive  
7 analysis wherein the respective parties have failed to  
8 present a sufficient record before this Court for a  
9 legal determination of their respective positions.  
10 There has been no discovery produced to the Court for  
11 consideration, no affidavits, no certifications, or  
12 sworn testimony derived from depositions. In fact,  
13 discovery has not been undertaken by the parties with  
14 respect to the declaratory relief sought in the  
15 Complaint. Notwithstanding these deficiencies, the  
16 Court will endeavor to address the legal arguments  
17 advanced by the respective parties on the extremely  
18 limited record provided to the Court.

19 The defendant, FMI, concedes that the  
20 plaintiffs' business operations were interrupted by an  
21 executive order based on the risk of the Covid-19 virus  
22 transmission throughout the State of New Jersey. The  
23 pivotal issue before this Court is the parties'  
24 interpretation of the subject policy language and FMI's  
25 claim denial premised on a narrow interpretation of the

1 terms of the subject policies. The issue before this  
2 Court is the interpretation of a direct covered loss  
3 under the policy and whether or not there was physical  
4 damage to the plaintiffs' business.

5 The plaintiffs argue that the loss of  
6 physical functionality and the use of their business  
7 constitutes a covered loss under the policies. The  
8 plaintiffs argue that Governor Murphy's executive order  
9 prohibited access to the plaintiffs' premises.

10 FMI argues that the plaintiffs failed to  
11 state a claim for civil authority coverage because the  
12 complaint does not allege that property damage occurred  
13 elsewhere leading to the loss of access to plaintiffs'  
14 business. The defendant acknowledged in their moving  
15 papers that presumably the plaintiffs will argue that  
16 while their properties were not physically damaged,  
17 they sustained a physical loss by operation of the  
18 Governor's executive order. FMI argues that the  
19 plaintiffs' loss of use of their respective properties  
20 does not constitute a direct physical loss and  
21 therefore is not a direct covered loss defined by the  
22 policies.

23 A simple review of the moving papers  
24 indicates that the defendant has not provided this  
25 Court with any controlling legal authority to support

1       their version of the interpretation of the defined  
2       terms in the policy. In fact, there is limited legal  
3       authority in the State of New Jersey addressing this  
4       issue. This is not surprising to the Court as the  
5       State of New Jersey was recently faced with a historic  
6       event which was unprecedented with respect to the  
7       losses sustained by businesses across the State of New  
8       Jersey due to the proliferation of the Covid-19  
9       pandemic. The defendant argues that there is a plain  
10      meaning of "direct physical loss" and the closure of  
11      the plaintiffs' business does not qualify for business  
12      -- I'm sorry, qualify for purposes of coverage. This  
13      is a blanket statement unsupported by any common law in  
14      the State of New Jersey or by a blanket review of the  
15      policy language. Moreover, there has been no discovery  
16      taken in this matter which would provide guidance to  
17      the Court with respect to a Motion to Dismiss filed  
18      under Rule 4:6-2(e).

19               Pursuant to the legal authority recited by  
20      this Court with regard to the standards associated with  
21      filing such a motion, the plaintiff should be permitted  
22      to engage in issue-oriented discovery and also be  
23      permitted to amend its complaint accordingly prior to  
24      an adjudication on the merits of any policy language.  
25      Such a motion is premature at best.

1           It is noteworthy to mention that the  
2       plaintiffs' argument set forth to this Court that the  
3       loss of use of their business because the State of New  
4       Jersey deemed all non-essential businesses unsafe  
5       constitutes a direct covered loss under the policy is  
6       the pivotal issue in the absence of any issue-oriented  
7       discovery on this topic is whether direct physical loss  
8       and direct physical damage encompasses closure for  
9       businesses that bears no specific -- relationship to a  
10      specific condition on the property pursuant to an  
11      executive order. The plaintiffs counter that argument  
12      by alleging that the executive order of the Governor  
13      deemed all non-essential businesses unsafe given the  
14      risk of transmission of Covid-19 thus the closure order  
15      had a specific relationship to a specific condition  
16      within the plaintiffs' business.

17           The plaintiffs provide a citation from  
18      Wakefern Food Corp. versus Liberty Mutual Fire  
19      Insurance Company, 406 N.J.Super. 524 (App. Div. 2019)  
20      to support their argument. Their argument based on the  
21      holding of Wakefern is that there was a finding of  
22      coverage for a grocery store that lost power when an  
23      electrical grid and transmission lines were physically  
24      incapable of performing their essential function of  
25      providing electricity even though they were not

1 necessarily damaged. The Court in Wakefern did hold  
2 that,

3 "Since the term "physical" can mean more than  
4 material alteration or damage, it is incumbent on the  
5 insurer to clearly and specifically rule out coverage  
6 in the circumstances where it was not to be provided."

7 Citing Wakefern versus Liberty Mutual  
8 Insurance Company, 406 N.J.Super. at 542. Also citing  
9 Customized Distribution Services versus Zurich  
10 Insurance Co., 373 N.J.Super. 480 at page 491 (App.  
11 Div. 2004), cert. denied at 183 N.J. 214 (2005).

12 The Court finds such an argument compelling  
13 for purposes of surviving a Motion to Dismiss pursuant  
14 to Rule 4:6-2(e) in the absence of any complete record  
15 for disposition. Again, the Court notes in the absence  
16 of the legal precedent set forth in Wakefern, there is  
17 a lack of controlling legal authority presented to the  
18 Court for consideration in this regard.

19 "When interpreting insurance contracts, the  
20 intention of the parties must be determined from the  
21 language of the policy," citing Stone v. Royal  
22 Insurance Company, 211 N.J.Super. 246 at page 248 (App.  
23 Div. 1986). "When the terms of the contract are clear  
24 and unambiguous, the Court must enforce the contract as  
25 written." That is an incitation at page 248.

1           The language which forms the basis of the  
2       complaint and the filing of a Motion to Dismiss is  
3       subject to further analysis and interpretation. By  
4       operation of the distinct and opposite interpretations  
5       of the language set forth before the Court by the  
6       parties with no other clarity from the record having  
7       been established to date, which the Court notes is  
8       largely non-existent, this Court reaches the inevitable  
9       conclusion solely for purposes of disposition of this  
10      Motion that the plaintiff should be afforded the  
11      opportunity to develop their case and prove before this  
12      Court that the event of the Covid-19 closure may be a  
13      covered event under the Coverage C, Loss of Income,  
14      when occupancy of the described premises is prohibited  
15      by civil authorities. There is an interesting argument  
16      made before this Court that physical damage occurs  
17      where a policy holder loses functionality of their  
18      property and by operation of civil authority such as  
19      the entry of an executive order results in a change to  
20      the property.

21           The plaintiffs are offering in advancing in a  
22      novel theory of insurance coverage in this matter that  
23      warrants a denial of the Motion to Dismiss at this  
24      early stage of the litigation. As such, this Court  
25      must afford the plaintiffs an opportunity to engage in

1 issue-oriented discovery with FMI in order to fully  
2 establish the record with respect to direct covered  
3 losses and to amend the Complaint accordingly if  
4 required. To that end, the Motion to Dismiss is  
5 denied.

6 Gentlemen, I will have an order prepared and  
7 most likely uploaded by this afternoon. Again, I want  
8 to thank you for your briefs and I thank you for your  
9 legal arguments here today.

10 MR. HARRISON: Thank you, Your Honor. Have a  
11 good weekend.

12 THE COURT: Thank you, gentlemen.

13 (Proceeding concluded at 10:08:29 a.m.)

14 \* \* \* \* \*



CERTIFICATION

I, Laura Scicutella, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CourtSmart, Index No. from 9:30:49 to 10:08:29, is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings, as recorded.

/s/ Laura Scicutella

Laura Scicutella

AD/T 685

AOC Number

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Agency Name

8/14/2020

Date